STATE OF MICHIGAN

COURT OF APPEALS

ASSOCIATED BUILDERS & CONTRACTORS OF MICHIGAN SELF INSURED WORKERS COMPENSATION FUND,

Plaintiff-Appellant,

v

ACKER STEEL ERECTORS, INC.,

Defendant-Appellee.

UNPUBLISHED
June 21, 2005

No. 250973
Jackson Circuit Court
LC No. 02-003733-AV

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order affirming in part and reversing in part the order of the district court. The district court denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition, holding that plaintiff's amended by-laws affecting the annual return of members' escrowed premium surplus were not applicable because they were implemented after defendant's contract with plaintiff was renewed. The circuit court found that the by-laws did not apply but that defendant was not entitled to $5,010.89 in accumulated surplus funds. The instant case arises from legislation that required plaintiff to change its bylaws and operating procedures. We affirm in part, reverse in part, and remand for a determination of attorney fees.

Plaintiff is a group self-insurer created in 1995 to provide workers' compensation coverage to members engaged in construction-related businesses. Pursuant to a master indemnity agreement on file with the Bureau of Workers' Disability Compensation (Bureau), businesses permitted to join plaintiff agreed to be jointly and severally liable for the payment of any lawful workers' disability compensation awards against any member of the fund. They also agreed that there would be no disbursements from the fund through dividends or distribution of accumulated reserves "except at the direction of the trustees after application to and approval by the bureau," and that funds would only be disbursed according to the rules, regulations, and bylaws of the fund, the agreement between the trustees and service agent, and rules of the Bureau with respect to self insurers. Before January 4, 1999, plaintiff refunded to its members in good standing, who had not withdrawn from the fund, premiums collected that were in excess of the amount necessary to pay claims and administrative expenses. Article IV, § 1 defined "a member in good standing" as one "whose membership dues are paid until the next regularly scheduled

renewal date." Plaintiff's bylaws also permitted surplus interest income earned on the invested premiums to be refunded to its members. Any refund required the approval of the Bureau:

> Any surplus monies for a fund year in excess of the amount necessary to fulfill all obligations under the act for that fund year, including a provision for claims incurred but not reported, may be declared to be refundable by the trustees at any time, and the amount of the declaration shall be a fixed liability of the fund at the time of the declaration. The date of payment shall be as agreed to by the trustees and the bureau, except that monies not needed to satisfy the loss fund requirements, as established by the aggregate excess contract, may be refunded immediately after the end of the fund year with the approval of the bureau. The intent of this rule is to ensure that sufficient monies are retained so that total assets are greater than total liabilities for each fund year." [1984 AACS, R 408.43j(2).]

Effective January 4, 1999, our Legislature amended MCL 500.2016, to provide in pertinent part:

> (1) In addition to other provisions of law, the following practices as applied to workers' compensation insurance including worker's compensation coverage provided through a self-insurer's group are defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (a) As a condition of receiving a dividend for the current or a previous year, requiring an insured to renew or maintain workers' compensation insurance with the insurer beyond the current policy's expiration date or requiring a member to continue participation with a workers' compensation self-insurer group.

On August 19, 1999, the director of the Bureau wrote to plaintiff advising that dividends, or surplus distributions, could no longer be withheld from members who left the group, but that the Bureau would consider provisions providing for escrow of the funds and would permit use of current members' surplus funds to offset premiums through discounts or credits. Surplus funds approved for distribution were required to be returned to members who withdrew on or after January 4, 1999. In December 1999, plaintiff amended its bylaws, effective May 1, 2000. The amended bylaws provided that surplus premiums would no longer be refunded; the fund would either apply the surplus premiums as a credit to future premiums or retain them. They also provided that any member who withdrew from the fund between January 4, 1999, and May 1, 2000, was eligible to receive a proportionate share of the surplus refund; but the refund would be held in escrow for ten years before refunded. A member's eligibility to receive the surplus was also conditioned on the member's not owing money to the fund. The Bureau approved the amended bylaws.

Because defendant did not renew its policy for the year beginning May 1, 2000, its policy expired on April 30, 2000. By not renewing its policy, defendant became one of eighty-five former members identified by plaintiff's administrator to the Bureau as members who had terminated participation during the window period; the administrator noted that defendant had an escrowed surplus of $5,010.89, but in a subsequent audit, plaintiff determined that defendant actually owed $10,777.55 in unpaid premiums for the fiscal year May 1, 1999, through April 30,

2000. Defendant's president responded to the audit by sending plaintiff a check for $973.64, reflecting the difference between the additional premium of $10,777.55 and the $9,801.91 defendant claimed it was owed on accumulated surplus from 1996 through 1999.

Plaintiff sued to collect the $9,801.91, and attorney fees. The parties filed cross motions for summary disposition. Plaintiff argued that the parties' contract changed as a result of the 1999 bylaws amendment and that it was entitled to escrow accumulated surplus dividends under the changed language to the bylaws that was dictated by MCL 500.2016. Defendant did not dispute that additional premiums were owed but argued that although the December 1999 bylaw change could apply to future contracts between plaintiff and its participating members, it did not apply to defendant's May 1, 1999 to April 30, 2000 contract. In response, plaintiff argued that the district court was not the proper jurisdiction to adjudicate the Bureau's interpretation of MCL 500.2016. The district court denied plaintiff's motion for summary disposition, granted $5,010.89 to defendant, and denied attorney fees to either party. When both parties appealed, the circuit court agreed that the amended bylaw did not apply to defendant, but reversed the $5,010.89 judgment to defendant. It found that the district court lacked authority to order continuing payments of surplus funds because the matter was being litigated in a class action by defendant and similarly situated corporations.[1] The circuit court also noted that because the $5,010.89 could vary from year to year based on pending claims against defendant, it was improper for the district court to award this amount.

Plaintiff first appears to argue that the district court did not have subject matter jurisdiction to interpret MCL 500.2016 because pursuant to MCL 500.2028 and Executive Order 1999-5, the director of the Bureau was given exclusive jurisdiction to investigate alleged violations of the statute, no private cause of action existed with respect to a violation of the Uniform Trade Practices Act, defendant was required to exhaust administrative remedies before seeking judicial review, and defendant could not collaterally attack the director's interpretation of MCL 500.2016. We disagree.

We review de novo whether the trial court had subject matter jurisdiction. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). "Circuit courts are courts of general jurisdiction, vested with original jurisdiction over all civil claims and remedies 'except where exclusive jurisdiction is given in the constitution or by statute to some other [tribunal].'" *Papas*

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[1] The class action case referred to by the circuit court is *Kennedy Masonry, Inc. v Associated Builders and Contractors Fund*, an unpublished opinion per curiam of the Court of Appeals, issued March 24, 1998 (Docket No 247016). In *Kennedy*, two subclasses of plaintiffs sought certification in an action against ABC Fund: 1) twenty or so members who withdrew from the fund during the window period between January 4, 1999 and May 1, 2000; and 2) eight members who had withdrawn or cancelled their policies after the date of the amended bylaws, May 1, 2000. *Id.* slip op at 4. Although the issues in *Kennedy* were similar to those in the present case and defendant clearly fit in the first subclass of plaintiffs, defendant was never made a member the *Kennedy* class action. *Id.* slip op at 7. The *Kennedy* Court declined to reverse the trial court's denial of class certification, noting that the common legal issues would soon be resolved by the instant case. *Id.* slip op at 7.

v Michigan Gaming Control Bd, 257 Mich App 647, 657; 669 NW2d 326 (2003), quoting MCL 600.605. If the statutory language indicates the Legislature's intent to convey exclusive jurisdiction on a state agency, a court must decline jurisdiction until administrative remedies have been exhausted. *Papas, supra.* Plaintiff claims that the Uniform Trade Practices Act, MCL 500.2001, *et seq.,* and specifically MCL 500.2028, provides exclusive jurisdiction to the Bureau to investigate alleged violations of the act. MCL 500.2028 merely provides that the commissioner has the power to investigate; it does not provide exclusive jurisdiction. Instead, MCL 500.2050 specifically provides that the powers conveyed by the act are not exclusive or intended to limit the powers of "any court of review." MCL 600.8301 provides that "the district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." Moreover,

> [w]hile it is the rule that the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment, *Sewell v Clearing Machine Corp,* 419 Mich 56, 62; 347 NW2d 447 (1984), the courts retain jurisdiction to determine more "fundamental" issues, and to adjudicate claims not based on the employer-employee relationship. *Id.* at 62, n 5 [*Westchester Fire Ins v Safeco Ins Co,* 203 Mich App 663, 669; 513 NW2d 212 (1994).]

Plaintiff next argues the circuit court erred when it required plaintiff to set off defendant's estimated portion of total profits against the undisputed amount defendant owed plaintiff when the distribution of surplus would amount to an unauthorized dividend; there was no statute, bylaw, or policy provision giving defendant a right to compel distribution; and plaintiff's retroactive application of its amended bylaws – which required escrow of a former member's accumulated surplus – complied with the Bureau's interpretation of MCL 500.2016. We agree in part.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins,* 458 Mich 288, 294; 582 NW2d 776 (1998). Because defendant moved for summary disposition under MCR 2.116(C)(10), and the court relied on matters outside the pleadings, review under sub rule (C)(10) is appropriate. *Driver v Hanley (After Remand),* 226 Mich App 558, 562; 575 NW2d 31 (1997). Summary disposition should be granted under MCR 2.116(C)(10) when review of the admissible evidence in a light most favorable to the nonmoving party indicates there is no genuine issue of material fact that would preclude judgment to the moving party. *Morales, supra.*

We first address the portion of plaintiff's original argument with which we do not agree. Plaintiff's argument is premised on the Bureau's determination that MCL 500.2016 was retroactive. In *Health Care Ass'n Worker's Comp Fund v Bureau of Worker's Disability Comp,* ___ Mich App ___, ___; ___ NW2d ___ (2005), slip op at 5, a panel of this Court concluded that MCL 500.2016 only applied to "conduct related to contracts that were entered into [on or after] the effective date of the pertinent provisions of MCL 500.2016." Thus, this Court has conclusively determined that MCL 500.2016 only applied prospectively. Both parties submitted supplemental authority briefs in response to the *Health Care* decision. Plaintiff argues that because the original contract between the parties was entered into in April 1996, the *Health Care*

decision dictates that MCL 500.2016 does not apply and, thus, the pre-amendment bylaws precluded leaving members from receiving a dividend. Defendant argues that it entered into a new contract with plaintiff on May 1, 1999, after the effective date of the statute and, therefore, under the *Health Care* decision, MCL 500.2016 applies.

Art. III, § 10 of the Master Indemnity Agreement stated in relevant part, "Application for continuing membership . . . shall constitute a continuing contract for each succeeding fiscal period." This indicates that the contract between the parties was subject to renewal each year. The insurance code requires a renewal certificate be filed with the state before being issued to a person for a new policy year. MCL 500.2236. A renewed insurance policy constitutes a separate contract with separate terms that are governed by general contract principles. *Industro Motive Corp v Morris Agency, Inc*, 76 Mich App 390, 396; 256 NW2d 607 (1977). Generally, an insurance company is bound by the terms of coverage in an earlier policy when the renewal contract is issued without calling the insured's attention to the new terms. *Id.* Applying this rationale to the present case, defendant's final renewal of its policy on May 1, 1999, constituted a separate contract with the coverage date beginning May 1, 1999. According to the *Health Care* decision, MCL 500.2016 applies to conduct with respect to the parties' final contract because it was entered into after the effective date of the statute. *Health Care Ass'n, supra,* slip op at 5. Moreover, unless there was some indication that defendant's attention had been called to the amended bylaws, the bylaws could not have applied retroactively. *Industro Motive Corp, supra* at 395-396.

Thus, had the trustees declared a dividend with respect to surplus income generated between May 1, 1999 and April 30, 2000, plaintiff could not have withheld the dividend from defendant on the ground that defendant failed to renew its insurance contract for the May 1, 2000 to April 30, 2001 year. *Health Care Ass'n, supra,* slip op at 5; MCL 500.2016. Although defendant claimed at oral argument that a distribution had been made, a review of the record did not indicate that plaintiff distributed $9,801.91, the amount defendant claimed as a set off. There was some indication in the record that plaintiff made a distribution with respect to the $5,010.89 defendant claimed it was owed; however, given this Court's decision in *Health Care Ass'n, supra,* slip op at 5, the only income defendant was entitled to was income arising from conduct that occurred between May 1, 1999 and April 30, 2000. Defendant forfeited any right to income arising before May 1, 1999, under Art VIII, § 4 of plaintiff's pre-amendment bylaws. *Id.* It is not possible to tell from the record before us how much of the $5,010.89 was from excess income accumulated on or after May 1, 1999.

As previously indicated, defendant's application for insurance stated that defendant agreed to be bound by the Worker's Disability Compensation Act. MCL 418.201 and MCL 418.205 of the act provided that the director of the bureau of worker's compensation had the power to create administrative rules consistent with the act to carry out the provisions of the act. 1997 MR 12, R 408.43i(1)(d) provides that trustees of a group self-insurer fund shall not "extend credit to individual members for payment of premium." Moreover, the insurance application provided that defendant agreed to adopt, ratify and assume the obligations of the indemnity agreement. The indemnity agreement provided that defendant agreed to pay any premium or lawful assessment within thirty days from the date it became due. Thus, defendant was obligated to pay the audited amount of $10,777.55 in unpaid premiums within thirty days of receipt.

The indemnity agreement also provided that disbursements had to be made according to the fund's rules, regulations, and bylaws. The pre-amendment bylaws provided that no distribution would be made to a member who was not in good standing, and a member in good standing was defined as a member "whose membership dues are paid until the next regularly scheduled renewal date." The term "membership dues" was not defined in the bylaws, the indemnity agreement, or the application. *Random House Webster's College Dictionarty* (2001), defines dues in relevant part as "a regular fee payable at specific intervals, esp. to a group or organization." The application refers to payments of annual premiums, the indemnity agreement refers to the payment of premiums, and the bylaws – using language similar to that used in the indemnity agreement – refer to the payment of annual contributions. Although the employment of the various terms is somewhat confusing, the context in which they are used indicates that the terms are annual fees a member must pay to maintain continued membership in the group and continued insurance coverage. Therefore, because defendant failed to pay the $10,777.55 in unpaid premiums, defendant was ineligible to receive any distribution under the terms of the pre-amendment bylaws.[2]

Finally, plaintiff argues that it is entitled to its reasonable attorney fees because under its bylaws, it may recover attorney fees in pursuing a debt owed by a member. Absent a statute or court rule to the contrary, attorney fees are generally not recoverable as costs. MCL 600.2405(6). Nevertheless, parties may by contract provide that the breaching party must pay the other party's attorney fees, and the provision will be judicially enforceable. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). However, recovery of attorney fees will only be enforced to the extent they are reasonable. *Id.* at 195-196.

Affirmed in part, reversed in part, and remanded for a determination of attorney fees. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[2] Even if defendant were eligible to receive a distribution, the terms of the indemnity agreement provided the trustees with discretion to "take all reasonable precautions which they deem[ed] appropriate to protect the Members from losses." Art III, § 6. The assistant administrator of the Self-Insured Programs Division of the Bureau testified that it was prudent fiscal policy to require a member to pay the premium before giving the money back to the group because the indemnification agreement would have to pay for the unpaid obligations of the member. Moreover, he noted that although not mandated by the Bureau, requiring distributions to be escrowed was prudent; it ensured payment of claims incurred during the covered year but filed after the member left.